

**BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD**

In the Matter of the Appeal of:

DENIO'S ROSEVILLE FARMERS
MARKET & AUCTION, INC.
2301 Opportunity Drive, Suite 140
Roseville, CA 95678

Employer

Docket No. 11-R2D1-2431

**DECISION AFTER
RECONSIDERATION
AND
ORDER OF REMAND**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code and having taken this matter under reconsideration, orders the matter remanded to the Administrative Law Judge to conduct further proceedings.

JURISDICTION

On September 6, 2011, the Division of Occupational Safety and Health (Division) issued to Denio's Roseville Farmers Market & Auction (Employer) one citation for failing to timely report a serious workplace injury. (Cal. Code Regs., tit. 8, §342(a).)¹ Employer was aware on Friday, April 1, 2011, that its employee suffered a serious workplace injury that needed to be reported to the Division. Employer's manager instructed another employee to report the injury accident to the Division, but the report was not made until five days later, on April 6, 2011.

The citation was timely appealed, and the matter came before an Administrative Law Judge (ALJ) of the Board. The parties stipulated to a series of facts, and the ALJ determined the appropriate penalty for the section 342(a) violation was \$3,400 by order dated February 27, 2012. On March 23, 2012, the Board issued its Order of Reconsideration to address whether the penalty determination was appropriate. Neither party filed an Answer to the Order of Reconsideration. We now address the appropriate penalty for this late report.

¹ All references are to Title 8, California Code of Regulations unless otherwise indicated.

DECISION AFTER RECONSIDERATION

The Labor Code assigns to the Board the duty to review penalties proposed by the Division. The Board is to approve, modify, vacate, or impose other appropriate relief when a citation is appealed. (Labor Code section 6602.) The Division proposed a \$5000 penalty for the violation, and declined to adjust the penalty for the size, good faith, or history of the employer. Labor Code section 6319 requires the Division to consider the effect of the employer's size, good faith, and history when setting a penalty.

We recently reviewed the effect of Labor Code section 6409.1(b), which was amended in 2002, and set the nominal penalty for failing to report serious injuries or deaths at \$5000. (*Allied Sales and Distribution, Inc.*, Cal/OSHA App. 11-0480, Decision After Reconsideration (Nov. 29, 2012); *SDCCD – Continuing Education N C Center*, Cal/OSHA App. 11-1196, Decision After Reconsideration (Dec. 4, 2012).) It is clear that the legislation in 2002 was directed at the penalty the Legislature intended to impose on employers who fail to report serious injuries, illnesses, or deaths. From this review of the Legislative history, it is also clear the Legislature made no indication as to its intention regarding late filed reports. (*Central Valley Engineering & Asphalt*, Cal/OSHA App. 08-5001, Decision After Reconsideration (Dec. 4, 2012).) In such circumstances, the pre-2002 penalty calculations cannot be deemed to have been repealed by implication. (*Central Valley Engineering, supra*; *Schatz v. Allen Matkins Leck Gamble & Mallory LLP* (2009) 45 Cal.4th 557, 571.) In reviewing the legislative history, we concluded that the penalty adjustment method articulated in *Trader Dan's dba Rooms N Covers, Etc.*, Cal/OSHA App. 08-4978, Decision After Reconsideration (Oct. 8, 2009) and *Bill Callaway & Greg Lay dba Williams Redi Mix*, Cal/OSHA App. 03-2400, Decision After Reconsideration (Jul. 14, 2006), was not what the Legislature intended when it amended Labor Code section 6409.1(b) to state "An employer who violates this subdivision may be assessed a civil penalty of not less than five thousand dollars (\$5,000)." Rather, when the violation is a late report, and there is some compliance with the reporting requirement, the only effect of the 2002 amendment of the Labor Code, and the subsequently adopted regulation (§ 336(a)(6)) was to increase the gravity-based penalty assessment from \$500 to \$5,000. Remaining unchanged by these amendments is the obligation in Labor Code section 6319 that the Division's regulation take in to consideration the size, good faith, and history of the employer when assessing a final penalty.

Here, the Division gave no consideration for those factors, in contravention of the requirement of Labor Code section 6319. The record discloses Employer had 128 employees, but no evidence relevant to the good faith and history of the Employer is contained in the record.

We therefore remand the matter to the ALJ to allow the Division to comply with Labor Code section 6319, and its own regulations, such as section 336(d), and evaluate the proper penalty. The ALJ is to impose a penalty consistent with Labor Code section 6319 unless other penalty-related defenses are established by Employer. (See, e.g., *Stockton Tri Industries, Inc.*, Cal/OSHA App. 02-4946, Decision After Reconsideration (Mar. 27, 2006).)

ART R. CARTER, Chairman
ED LOWRY, Member
JUDITH S. FREYMAN, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: December 26, 2012